Filed 10/23/12 Primex Farms v. Chaparrel Farms CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PRIMEX FARMS, LLC,

Plaintiff and Appellant,

v.

CHAPARRAL FARMS, INC.,

Defendant, Cross-complainant and Appellant;

KLEPPER AG SERVICES, INC.,

Cross-defendant and Respondent.

F060514

(Super. Ct. No. 07CECG02935)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Adolfo M. Corona, Judge.

Dowling, Aaron & Keeler, Dowling Aaron Incorporated, Lynne Thaxter Brown; Law Offices of Walter W. Whelan, Walter W. Whelan and Brian D. Whelan for Plaintiff and Appellant Primex Farms, LLC.

Bingham McCutchen, Stephen Zovickian, Frank M. Hinman, Robert A. Brundage, Danielle M. Foreman; Caswell, Bell & Hillson, Robert K. Hillison and Kimberly L. Mayhew for Defendant, Cross-complainant and Appellant Chaparral Farms, Inc.

Perkins, Mann & Everett, Jerry H. Mann and Craig A. Tristão for Cross-defendant and Respondent Klepper Ag Services, Inc.

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Defendant, Chaparral Farms, Inc. (Chaparral), challenges a $3.4 million judgment in a breach of contract action brought by plaintiff, Primex Farms, LLC (Primex). The jury found that Chaparral's agent, Bill Klepper, the owner of cross-defendant, Klepper Ag Services, Inc. (Klepper Ag), had both actual and ostensible authority to sign a contract on behalf of Chaparral agreeing to deliver Chaparral's 2006, 2007, and 2008 pistachio crops to Primex for processing. Chaparral only delivered its 2006 crop to Primex and delivered its 2007 and 2008 crops to another processor.

Chaparral contends that the judgment is not supported by substantial evidence. According to Chaparral, Klepper did not have authority to sign the contract with Primex. Moreover, Chaparral argues, Klepper breached his fiduciary duty to Chaparral when he failed to inform Chaparral that he had signed the purported contract. Chaparral further argues that the trial court erred when it refused to instruct the jury that Primex had a duty to ascertain the scope of Klepper's authority and when it admitted extrajudicial statements made by Klepper. In its cross-appeal, Primex asserts that the trial court incorrectly denied its request for prejudgment interest.

Contrary to Chaparral's position, substantial evidence supports the judgment and the trial court did not err as claimed. Further, Primex is not entitled to prejudgment interest. Accordingly, the judgment will be affirmed.

BACKGROUND

Primex processes, roasts and packs pistachios and then resells them, both in shell and as kernels. Primex is owned by Ali Amin and his family, who have been in the

pistachio business in Iran and California for four generations. Amin was born in Iran and speaks both Farsi and English.

Chaparral grows pistachios on approximately 960 acres. Chaparral's president and owner is Mohammad Taghi Alaghbandian (M.T.).[1] M.T. lives in Iran and does not speak English. He speaks Farsi. However, other Chaparral employees do speak English, including Behrouz Saba, who was Chaparral's agent in Austria, and Abbas Alaghbandian (Abbas), Chaparral's chief financial officer and M.T.'s brother.

Klepper Ag was a farm management company that specialized in managing pistachio orchards for third parties. Klepper passed away in June 2008 and the company shut down in May 2009.

Klepper assisted Chaparral with developing the orchard beginning in the early 1990's. Klepper helped to locate the land, prepared the land, installed an irrigation system and planted the trees. In 2003, Klepper signed an agricultural management agreement with Chaparral.

Klepper took care of all of Chaparral's business operations in California. On behalf of Chaparral, Klepper signed filings with the California Secretary of State. Klepper also executed agricultural leases and water exchange and water purchase agreements. Klepper and his office assistant, Rosemary Farrar, took care of all of Chaparral's banking needs. Farrar made all bank deposits, wrote checks to vendors, and balanced the Chaparral account. Klepper and Farrar were the only signatories on the Chaparral account. All of the revenue generated from the sale of Chaparral's crops flowed through this account.

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1 We use initials and first names for convenience only. No disrespect is intended.

The Amin and Alaghbandian families had a long-standing business relationship. During all of Amin's dealings with M.T., M.T. assured Amin that Primex would always receive Chaparral's crop.

Amin testified that, over the years, M.T. referred to Klepper "as being the person in charge, and at the same time also praising him as being an honest man and someone who takes care of their stuff." Amin further explained that, although he had discussions with Saba, Chaparral's agent in Austria, all decisions and actions came through Klepper. From Amin's perspective, Klepper was Chaparral's person in California.

Although M.T. did not testify at trial, portions of his deposition were read into the record. M.T. explained that he has 23 or 24 factories and 7,000 or 8,000 workers. In contrast, Chaparral was a "very, very small company," that M.T. referred to as a "pistachio field." Accordingly, it was M.T.'s practice to not pay a lot of attention to Chaparral. He "was after [his] other businesses" and only wanted the money from Chaparral. M.T. testified that because he was in Iran, he gave Klepper the responsibility for agriculture and to do what was necessary to farm the crops for Chaparral.

It was Amin's practice to have written processing contracts with Primex's growers. Due to the complexity of the agreement with the growers, it was unacceptable to Amin to not have a contract. Nevertheless, Primex processed Chaparral's 2002 and 2003 crops without written contracts. Chaparral never returned the signed contracts.

However, Amin insisted that Chaparral return the 2004 contract. Amin told Saba that if Chaparral wanted to get paid, it would need to sign the contract. Thereafter, Amin received the 2004 contract signed by Klepper. Klepper also signed the 2005 processing contract on behalf of Chaparral. M.T. testified that in signing the 2004 and 2005 processing contracts, Klepper was following Chaparral's instructions.

Primex developed a new contract for its growers in 2006. The new contract offered growers a 5 cent per pound bonus for a three-year commitment and added a new

payment option. The older version had offered a 2 cent per pound bonus for a three-year commitment and had only one payment option.

In August 2006, before the harvest, Amin sent a copy of the new contract to Saba and discussed it with him. Amin told Saba that if Chaparral signed a three-year contract he would be willing to pay a retroactive 2 cent per pound bonus for the 2005 crop. In 2005, Saba had requested that Chaparral be paid the 2 cent per pound bonus retroactively because Chaparral had delivered three crops in a row to Primex. At that time, Amin explained that it was a commitment bonus given on a going forward basis only.

In October 2006, Amin traveled to Iran and talked briefly with M.T. Amin attempted to discuss the new contract and his offer to give a 2 cent retroactive bonus but M.T. was not interested in all the detail. When Amin mentioned the 2 cent retroactive bonus, M.T. interrupted and said "Mr. Amin, you know, $.02 is not important to us, relationship is important to us, we value your relationship." M.T. was very complimentary of the service Primex had given and told Amin "We will always support you, and you will always have us."

When Amin returned to California, the 2006 contract from Chaparral was in his mail. This contract was again signed by Klepper. The one-year rather than the three-year option had been marked but Klepper had not selected between the two payment options. Amin called Klepper to ask him to select a payment plan. Amin also wanted Klepper to discuss the contract term with Chaparral to make sure that it was Chaparral's choice. Amin knew that Chaparral wanted to get the maximum amount of money and Amin had been told by M.T. that he would always get Chaparral's crop. Additionally, Amin did not want Chaparral to come back later and say that it deserved a commitment bonus.

A couple of weeks later, Amin received the Chaparral contract with the three-year term and the new payment option selected. As with the 2004 and 2005 contracts, this contract was signed by Klepper.

Paramount Farms, Inc. (Paramount) is the largest pistachio processor in California and handles approximately 65 percent of all pistachios grown in the state. Beginning in 2007, Paramount started offering to sell its stored irrigation water to growers who signed a three-year contract with it.

In May 2007, a representative of Paramount traveled to Vienna and met with Saba to discuss whether Chaparral could do business with Paramount. Thereafter, M.T. signed a contract agreeing to deliver Chaparral's 2007, 2008 and 2009 crops to Paramount.

In August 2007, shortly before the 2007 harvest, Klepper learned that Chaparral had signed a contract with Paramount. Klepper received a phone call from Saba that was overheard by Joan Klepper (Joan), Klepper's wife. Joan heard Klepper say "Saba, you cannot do this. You have a signed contract with Primex for three years." Klepper then stated something to the effect of "I've always provided water for you. I've always been able to get water for you." Immediately after Klepper got off the phone, Joan spoke to him. She described Klepper as being excited, angry, irritated and very upset. When Joan asked "What in the world is going on?" Klepper responded "I cannot believe it, … Paramount has gone to Austria and guaranteed water to … Chaparral." "They've chose to completely ignore their contracts they have with Primex." According to Joan, Klepper stated that he had been told to sign a three-year contract with Primex. Klepper said "They told me to sign it."

On August 2, 2007, Klepper sent an email to Saba with a copy to M.T. Klepper wrote "[T]he 2007 contracts for delivery of your crop need to be reviewed. Will it be Paramount or Primex? I signed a three year contract in November of 2006. It is now my understanding that you signed a contract with Paramount. Please advise me on how to plan for the delivery of your crop." Chaparral responded "please be advised that we have already signed a three-year contract with Messers Paramount. Therefore, you are kindly requested to deliver the new crop to them."

In early August 2007, Amin first learned that Chaparral had signed a contract with Paramount for the processing of Chaparral's 2007, 2008 and 2009 crops. Amin was surprised. He had been anticipating Chaparral's crop to provide 20 percent of Primex's pistachio supply.

Thereafter, Amin spoke to both Saba and M.T. Saba was apologetic and told Amin that Paramount had come to visit. Saba stated that he tried to convince M.T. not to go with Paramount but that M.T. signed the contract. M.T. told Amin that it was Saba's decision to switch to Paramount.

By letter dated August 13, 2007, Primex, through its attorney, sent a demand to Chaparral, in care of Klepper, insisting that Chaparral honor the three-year contract with Primex. Klepper Ag forwarded this demand letter to Saba.

In response, Klepper received a letter dated August 20, 2007, addressed "To Whom It May Concern" and signed by M.T. This letter stated "Bill Klepper has no authority to sign an agreement binding Chapparal [*sic*] Farms Inc., aka, Chapparal [*sic*] Industries Inc. to a pistachio processing contract."

Rosemary Farrar, Klepper's office assistant, was present when Klepper received the August 20 letter from M.T. Farrar testified that Klepper was speechless, in shock, confused and very angry.

Klepper received a second letter signed by M.T. dated September 11, 2007. In this letter M.T. stated that Klepper was "not entitled to sign" the three-year contract with Primex "or any other contracts with Primex and/or any other person without my official written confirmation. You were not authorized to do so." M.T. expressed that he was "astonished" that Klepper entered into a contract with Amin without his acknowledgement and written consent and recommended that Klepper contact Amin "and solve the problem based on an amicable way."

Again, Farrar was present when Klepper received this letter from M.T. Farrar testified that Klepper was furious and that she heard him say "This is just fucking bullshit."

Chaparral continued its relationship with Klepper until his death in June 2008 and then with Klepper Ag until the company shut down in 2009.

M.T. terminated Saba and Abbas, M.T.'s brother, became the chief financial officer for Chaparral in early 2008. M.T. testified that he terminated Saba because Saba was lazy.

Farrar asked Abbas about Saba one time and Abbas replied "Well, Mr. Saba is in the Siberia of Europe." When Farrar asked what that meant, Abbas told her "You don't want to know."

Pistachios are an alternate bearing crop. During an "on" crop year, an orchard produces approximately twice the number of pistachios as during an "off" crop year. Nevertheless, customers want the same supply of nuts each year. Accordingly, Primex needs to maintain a sufficient inventory to meet customer needs throughout the year or it will lose customers.

By the time Amin learned that Primex would not receive Chaparral's 2007 crop it was not possible to replace those nuts. The growers had already committed their crops to other processors. Therefore, Primex was forced to purchase already processed nuts to maintain its inventory.

Primex filed the underlying complaint against Chaparral for breach of contract alleging damages based on Chaparral's non-delivery of its 2007 and 2008 pistachio crops. Chaparral denied there was a contract and filed a cross-complaint against Klepper Ag for indemnity. Chaparral alleged that Klepper Ag breached its fiduciary duty to Chaparral.

The case was tried to a jury. The jury found that Klepper had actual and ostensible authority to enter into the contract with Primex and that Chaparral had

breached the contract. The jury awarded Primex $3,460,043 in damages. The jury further found that Klepper Ag owed Chaparral a fiduciary duty but had not breached it.

DISCUSSION

1. *Chaparral's appeal.*

a. The record supports the jury's findings that Klepper had both actual and ostensible authority.

i. Standard of review.

Chaparral argues there is no substantial evidence to support the jury's findings that Klepper had actual or ostensible authority to sign a three-year processing contract. Thus, the power of this court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support these findings. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) Accordingly, the evidence must be viewed in the light most favorable to Primex, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) Nevertheless, the evidence must be substantial, i.e., reasonable, credible and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 (*Kuhn*).)

Substantial evidence may consist of inferences. However, "such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation] …." (*Kuhn, supra,* 22 Cal.App.4th at p. 1633.) Further, when confronted with conflicting inferences, this court cannot substitute its own deductions for those of the jury. (*Wilmot v. Commission on Professional Competence* (1998) 64 Cal.App.4th 1130, 1139.) The burden is on Chaparral to demonstrate error. (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 142.)

ii. Authority.

Here, it is undisputed that Klepper acted as Chaparral's agent. As such, Klepper represented Chaparral in dealings with third persons. (*van't Rood v. County of Santa*

Clara (2003) 113 Cal.App.4th 549, 570.) At issue is the extent of Klepper's authority, i.e., what authority Chaparral actually or ostensibly conferred upon him. (Civ. Code, § 2315.)

Actual authority exists when a principal expressly confers such authority or, by his intentional or negligent conduct, causes *the agent* to reasonably believe that the principal consents to the agent's execution of an act on the principal's behalf. (Civ. Code, § 2316; *Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal.2d 638, 643 (*Tomerlin*).) Ostensible authority arises as a result of the principal's conduct that causes *the third party* to reasonably believe that the agent possesses the authority to act on the principal's behalf. (*Tomerlin, supra,* at p. 643.) "'An agent's authority may be proved by circumstantial evidence.…' [Citation.]" (*Id.* at p. 644.)

iii. The actual authority finding.

Chaparral contends that the record is devoid of evidence that Chaparral intentionally granted Klepper authority to enter into a multi-year contract to sell pistachios. Contrary to Chaparral's position, such evidence does exist. Joan's testimony regarding Klepper's 2007 telephone conversation with Saba supports the jury's finding. As outlined above, after Joan heard Klepper's side of the telephone conversation and asked him what was going on, Klepper responded that Paramount had guaranteed water to Chaparral and that Chaparral had chosen to ignore their contract with Primex. According to Joan, Klepper stated that he had been told to sign a three-year contract with Primex. Klepper said "They told me to sign it." From this, the jury could logically and reasonably infer that someone at Chaparral told Klepper to sign the contract and thus he was authorized to do so.

Chaparral acknowledges this evidence but claims that it is not more probable than not that "they" referred to Chaparral. Chaparral contends that such an inference would have to be drawn "from thin air" and thus this testimony is insufficient to establish actual authority. (Cf. *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) In

other words, a reasonable trier of fact could not find that Klepper had actual authority based on this evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 857.)

However, in the context in which this discussion took place, the inference that "they" referred to Chaparral is "'a product of logic and reason"' and rests on the evidence. (*Kuhn, supra,* 22 Cal.App.4th at p. 1633.) We cannot substitute our own deductions for those of the jury. Accordingly, substantial evidence supports the actual authority finding.

Chaparral further argues that Klepper's out-of-court statement that "They told me to sign it" is not competent evidence that he had actual authority based on the general rule that the "declarations of an agent are not admissible to prove the fact of his agency or the extent of his power as such agent." (*Howell v. Courtesy Chevrolet, Inc.* (1971) 16 Cal.App.3d 391, 401.) Chaparral notes that over a century of law has held such declarations to be inadmissible.

Even if this rule may apply in some circumstances, it is inapplicable to the issue of whether the agent had *actual* authority. Rather the rule against admitting the agent's out-of-court declarations to prove the fact of the agency applies to the issue of *ostensible* authority. For example, in *Petterson v. Stockton & T.R. Co.* (1901) 134 Cal. 244, relied on by Chaparral, the court stated "Agency cannot be proved by the declarations of the agent …. What [the third party] believed, without some action on the part of the [principal] justifying such belief, would cut no figure." (*Id.* at p. 246.) Thus, the court was concerned with ostensible authority.

Similarly, the other cases relied on by Chaparral concern ostensible authority. (E.g., *South Sacramento Drayage Co. v. Campbell Soup Co.* (1963) 220 Cal.App.2d 851, 857; *Howell v. Courtesy Chevrolet, Inc., supra,* 16 Cal.App.3d at p. 401; *Raleigh v. Lee* (1914) 26 Cal.App. 229; *Hubback v. Ross* (1892) 96 Cal. 426; *Scott v. Los Angeles Mountain Park Co.* (1928) 92 Cal.App. 258; and *J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388 (*J.L*).) As explained by the court in *J.L.*, "Ostensible agency cannot

be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists. [Citations.] ' "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury. [Citation.]" [Citation.]' [Citation.]" (*J.L., supra*, 177 Cal.App.4th at p. 404.)

Unlike ostensible authority, actual authority can be based on the agent's reasonable belief that the principal consented to the agent's execution of an act. Thus, evidence of the agent's belief is relevant. A third party's belief, which must be based on the acts of the principal rather than the agent, is not involved. Accordingly, the estoppel doctrine is inapplicable. Therefore, the agent's declarations are not inadmissible as evidence of actual authority. The reason for excluding the agent's extrajudicial declarations as proof of the agency does not exist.

Farrar's testimony regarding Klepper's reactions to the letters from Chaparral stating that Klepper was not authorized to sign the three-year contract with Primex further supports the actual authority finding. Based on Klepper's confusion and angry outburst upon receipt of the letters, the jury could reasonably infer that Klepper believed he had authority to sign the contract.

Chaparral argues the trial court erred in admitting Klepper's extrajudicial statement that denial of his authority was "bullshit" based on the rule that agency cannot be proved through the agent's declarations. However, as discussed above, this rule is inapplicable here because the evidence was admitted to prove actual authority, not ostensible authority.

iv. The ostensible authority finding.

Even though the jury's finding that Klepper had actual authority alone supports the judgment, we will also consider and uphold the jury's finding that Klepper had ostensible authority.

Chaparral argues the ostensible authority finding is not supported by substantial evidence because there is no evidence that Chaparral intentionally caused or allowed Amin to believe that Klepper had authority to enter into a three-year contract to sell pistachios. Chaparral acknowledges that Klepper had authority to sign the one-year contracts. Nevertheless, Chaparral asserts, a three-year contract is not a similar transaction and thus, the fact that Klepper signed one-year contracts could not have lulled Amin into reasonably believing that Klepper had authority to sign the three-year contract.

Before recovery can be had against the principal for the acts of an ostensible agent, three requirements must be met: (1) The person dealing with an agent must do so with a reasonable belief in the agent's authority; (2) such belief must be generated by some act or neglect by the principal sought to be charged; and (3) the person relying on the agent's apparent authority must not be negligent in holding that belief. (*J.L., supra*, 177 Cal.App.4th at pp. 403-404.)

Here, the parties, Amin and M.T., had a long-term business relationship. Klepper assisted M.T. with developing Chaparral and handled all of Chaparral's business operations in California. In speaking with Amin, M.T. referred to Klepper as being the person in charge and praised Klepper as an honest man "who takes care of their stuff." From Amin's perspective, all of Chaparral's decisions and actions came through Klepper. It was Klepper who signed the prior contracts, signed filings with the California Secretary of State on behalf of Chaparral and handled all of Chaparral's banking needs. Moreover, M.T. told Amin that Amin would always get Chaparral's crop.

Under these circumstances, the jury could reasonably find that Klepper had ostensible authority to sign the three-year contract with Primex. M.T.'s hands off approach to the business and dependence on Klepper to run Chaparral, along with his statements that Klepper was in charge, that Klepper was an honest man and that Amin would always get Chaparral's crop, supports finding that Amin's belief that Klepper had authority was reasonable and was generated by M.T.'s conduct. Moreover, due to their

long-standing business relationship and M.T.'s assurances that Chaparral would always support Primex, the evidence supports finding that Amin was not negligent in holding the belief that Klepper had authority.

b. The trial court did not err in refusing Chaparral's proposed jury instruction.

Chaparral requested the trial court to instruct the jury that "persons dealing with … an assumed agent who attempt … to hold the principal responsible for the agent's acts are bound at their peril to ascertain, not only the fact of the agency, but the nature and extent of the agent's authority." The court refused. Chaparral argues this was error because the instruction was legally correct and was supported by abundant evidence.

A party is entitled, upon request, to correct, nonargumentative instructions on every asserted theory of the case that is supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) The propriety of a jury instruction is a question of law. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.)

The text of Chaparral's proposed instruction comes from *Hill v. Citizens Nat. Trust & Sav. Bk.* (1937) 9 Cal.2d 172, 177 (*Hill*). In *Hill*, the appellants sought to recover under a contract by which another corporation agreed to sell certain real estate on the ground that the corporation was the agent of the respondent bank. However, not only was there no evidence of the corporation's actual authority to sell the land on behalf of the bank, there was no evidence of ostensible authority either. The bank was unaware of the corporation's existence. Under these circumstances, the court noted that the appellants took the "risk not only of ascertaining whether the person with whom he is dealing is the agent, but also of ascertaining the scope of his powers." (*Hill, supra,* 9 Cal.2d at p. 177.) The court declared it to be a fundamental rule "that persons dealing with an assumed agent … are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it." (*Ibid.*)

While Chaparral is correct that its proposed instruction was an accurate statement of the law, it nevertheless was inapplicable to this case. Chaparral's instruction pertains to an *assumed* agent. Here, it was undisputed that Klepper was Chaparral's agent.

Additionally, this proposed instruction was inconsistent with the instruction given that "[a]t all relevant times, Klepper Ag Services, Inc. was the agent of Chaparral Farms, Inc." Thus, the proposed instruction could have misled the jury. The trial court is not required to give instructions that are misleading. (*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 522.)

Moreover, even if we assume the trial court should have given this proposed instruction, the failure to do so was not prejudicial. The jury found that Klepper had actual authority to sign the three-year contract with Primex, a finding that is supported by substantial evidence. "Where the agent acts within the scope of his actual authority, it is immaterial whether or not an inquiry into the extent of the authority has been made by a person dealing with the agent." (*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 115.)

c. The record supports the defense verdict on Chaparral's cross-complaint.

Chaparral cross-complained against Klepper Ag alleging that Klepper breached his fiduciary duty to Chaparral by not informing Chaparral that he had signed the three-year contract with Primex. The jury found that Klepper owed a fiduciary duty to Chaparral but that he did not breach that duty. Chaparral contends this finding is not supported by substantial evidence.

The trial court instructed the jury on Chaparral's burden as follows:

> "… On the cross-complaint of Chaparral Farms, Inc., against Klepper Ag Services, it is the burden of Chaparral Farms, Inc., to establish that Klepper Ag Services breached its fiduciary duty by exceeding its authority in signing the three-year Primex agreement and/or failing to notify Chaparral Farms, Inc., that he signed it."

When the jury returned the defense verdict on the cross-complaint, it implicitly concluded that Chaparral, as the cross-complainant, did not carry its burden of proof. In

this situation, i.e., an appeal of a judgment that was based on a failure of proof, it is somewhat misleading to characterize the issue as whether substantial evidence supports that judgment. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279.) This is because the problem before this court is not whether Chaparral proved by a preponderance of the evidence that Klepper breached his fiduciary duty. That was a question for the jury and it was resolved against Chaparral. The question for this court is whether the evidence compels a finding in favor of Chaparral as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at p. 279.) "Specifically, the question becomes whether [Chaparral's] evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'" (*Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at p. 279.) The answer here is no.

Relying on the rule that an agent has a fiduciary duty to the principal to disclose all information in the agent's possession that is relevant to the agency (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 304), Chaparral contends that Klepper breached his fiduciary duty when he did not inform Chaparral that he had signed the Primex contract. Chaparral argues that, because there is no record of any fax, letter, email, or telephone call timely informing Chaparral that Klepper signed the contract, the record does not support the jury's finding.

However, the jury found that Klepper was instructed by Chaparral to sign the three-year contract with Primex. As discussed above, the evidence supports this finding. Thus, there is evidence from which the jury could have reasonably concluded that Chaparral already knew that the contract had been signed and thus it was unnecessary for Klepper to disclose this information. Accordingly, the record does not contain uncontradicted evidence of such character and weight as to compel a finding that Klepper

breached his fiduciary duty to Chaparral. Therefore, the record supports the verdict on the cross-complaint.

d. The jury properly awarded replacement cost damages.

i. Damages under the Commercial Code for seller's breach of contract.

The California Uniform Commercial Code provides a buyer with several alternative remedies for a seller's breach of contract. (Cal. U. Com. Code, § 2711.) A buyer can "'cover' by making in good faith and without unreasonable delay any reasonable purchase of … goods in substitution for those due from the seller." (§ 2712, subd. (1).) In that case, "[t]he buyer may recover from the seller as damages the difference between the cost of cover and the contract price …." (§ 2712, subd. (2).) The failure to effect cover does not bar the buyer from any other remedy. (§ 2712, subd. (3).)

If the buyer is either unable to cover or elects not to cover, the measure of damages is the difference between the market price at the time the buyer learned of the breach and the contract price. (Cal. U. Com. Code, § 2713; *KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 381 (*KGM Harvesting*).)

Under either alternative the buyer may also recover incidental and consequential damages. (Cal. U. Com. Code, §§ 2711, 2715.) Consequential damages include any loss resulting from the buyer's general or particular requirements and needs of which the seller had reason to know at the time of contracting and that could not reasonably be prevented by cover or otherwise. (§ 2715, subd. (2)(a).)

ii. Replacement costs damages were legally available.

By the time Primex learned that Chaparral would not be delivering its 2007 crop, Primex was unable to replace these unprocessed pistachios because growers had already committed their crops to other processors. Chaparral's 2007 crop represented approximately 20 percent of Primex's anticipated supply for that year. Further, because 2007 was an "on" crop year, Primex had been planning to have four to five million pounds of pistachios in its inventory to mitigate the "off" crop year in 2008.

In 2007 and 2008 Chaparral produced approximately 5.5 million pounds of pistachios. Without these pistachios, Primex had an inventory shortage. To mitigate a potential loss of customers, Primex purchased finished pistachios, i.e., already processed, both in shell and kernels, to add to its inventory.

Primex suffered a loss on the purchased nuts because Primex was not able to charge for the processing. This loss is known as the contribution margin. Chaparral does not dispute Primex's entitlement to contribution margin damages. However, due to market fluctuations, Primex incurred an additional loss when it was required to sell some of the purchased nuts for less than it paid for them. Primex's expert, Susan Thompson, referred to this component as the replacement cost loss. To determine the selling prices, Thompson used the average sales prices from all of Primex's sales during the 2007 and 2008 crop years.

Chaparral argues that the trial court erred in permitting the jury to award Primex damages for its replacement cost loss. According to Chaparral, the finished pistachios were cover goods and Primex did not meet the requirements for cover damages. Therefore, Chaparral asserts, Primex was limited to damages under California Uniform Commercial Code section 2713, i.e., the difference between the market price and the contract price.

As noted above, when a seller breaches the contract, the buyer may cover by buying substitute goods, in good faith and without unreasonable delay. Here, Primex could not cover with unprocessed pistachios because none were available at the time of the breach. Nevertheless, although the parties did not characterize them as such in the trial court, the finished pistachios were arguably substitute goods. (Cf. *KGM Harvesting, supra,* 36 Cal.App.4th at p. 385, fn. 4.)

In any event, Primex was not required to cover and was still entitled to damages. Primex could recover the difference between the market price and the contract price plus any incidental and consequential damages. (*KGM Harvesting, supra,* 36 Cal.App.4th at

p. 381.) However, because no unprocessed pistachios were available to Primex at the time of the breach, there was no market price. Be that as it may, Primex was not precluded from receiving consequential damages. An award of damages as measured by California Uniform Commercial Code section 2713, is not a prerequisite to an award of consequential damages. (*Green Wood Industrial Co. v. Forceman Internat. Development Group, Inc.* (2007) 156 Cal.App.4th 766, 773-774.)

Due to Chaparral's breach, Primex lost about 20 percent of its anticipated pistachio supply. Primex must keep an inventory of finished pistachios to maintain the supply during the "off" crop years or risk losing customers both that year and in the future. Accordingly, to mitigate its damages, Primex purchased finished pistachios to compensate for its inventory shortage during 2007 and 2008. There is no indication that these purchases were not made in good faith. However, the price of pistachios fluctuates. Unfortunately, Primex was not prescient and did not time the market properly. Rather, it purchased high and, in order to fulfill certain contracts, was required to sell low.

Nevertheless, Primex made a reasonable, albeit somewhat unsuccessful, effort to avoid loss. Chaparral was the party in breach. Accordingly, the risks incident to Primex's effort are to be carried by Chaparral, the party whose wrongful conduct caused such effort to be necessary. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460.) Under these circumstances, the losses incurred by Primex in its effort to avoid losses resulting from Chaparral's breach are recoverable as damages. (*Id.* at p. 461.)

iii. The replacement cost damages award is supported by the record.

To arrive at a figure for the replacement loss, Primex's expert, Thompson, calculated the cost of the replacement nuts per pound purchased by Primex during the 2007 crop year and then calculated the average selling price per pound for nuts during the 2007 crop year. Comparing these two prices, Thompson concluded that Primex had sold the replacement nuts at a loss. Because Primex's 2007 purchases did not fully make up

for the inventory loss due to Chaparral's breach, Thompson did a similar calculation for 2008.

Chaparral's expert, Kenneth Rugeti, primarily agreed with Thompson's numbers. His disagreement was with the sales price. Instead of averaging the 2007 crop year sales, Rugeti averaged the 2008 crop year sales. It was Rugeti's opinion that the replacement nuts were actually sold as part of the 2008 crop. Based on this analysis, Rugeti opined that Primex made a profit on the replacement nuts.

Other factors affecting the replacement cost analysis were testified to by Amin. Amin explained that the replacement nuts were blended into Primex's inventory, as is the usual practice, and thus it was not possible to determine the exact selling price for those nuts. Primex's inventory consists of pistachios left over from the previous crop year, the crop it receives from growers for the current crop year and additional purchases of finished nuts. These nuts are blended depending on the quality of grade that is needed to meet the customers' orders. Therefore, it was not possible to keep track of any particular pistachios. Amin also testified that, in the nut trading business, many of the contracts for the entire year are entered into in September or October at the beginning of the crop year. Those contracts set the price at the time they are entered and may cover future shipments that take place up to as long as 16 months later.

Chaparral argues that substantial evidence does not support the replacement cost award. Chaparral notes that Thompson admitted that she did not know the actual selling price of the replacement nuts. In fact, it is not possible to make that determination. Chaparral objects to Thompson's use of the average price for the whole year as the selling price. Chaparral asserts that there is no evidence to support the assumption that this average price is the price the replacement nuts were sold for. According to Chaparral, sales of the 2007 crop occurred long before Primex bought the replacement nuts and there is no evidence that the nuts sold were the replacement nuts.

The jury was presented with opposing views of how the replacement cost damages should be calculated, weighed that evidence, and agreed with Primex's calculation. While it is true that the replacement nuts were purchased throughout the 2007 crop year, i.e., between October 2007 and August 2008, evidence was presented that in the usual course of business, Primex enters contracts at the beginning of the crop year and, at that time, sets the prices for shipments that take place later in the year, regardless of the price Primex paid for the nuts shipped. Viewing this evidence in the light most favorable to Primex, giving it the benefit of every reasonable inference and resolving all conflicts in its favor, Thompson's use of the average price for the year to calculate the replacement cost award is supported by substantial evidence.

Chaparral's breach caused Primex to suffer damages. That fact is undisputed. Where the *fact* of damages is certain, the *amount* of damages need not be calculated with absolute certainty. (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398.) The law only requires that some reasonable basis of computation be used. The result reached can be a reasonable approximation. (*Ibid*.) The jury was presented with a reasonable basis for computing damages arising from Chaparral's breach and arrived at a reasonable approximation.

2. *Primex's appeal.*

There are two components to the damages that were awarded to Primex, the contribution margin and the replacement cost. The contribution margin damages are based on the per pound profit Primex would have made on the processing of the pistachios that Chaparral delivered to Paramount in 2007 and 2008.

Primex's expert, Thompson, calculated the contribution margin by starting with the total cost incurred by Primex in processing nuts. This total cost was segregated into two categories, fixed costs and variable costs. The variable costs that are directly related to processing were then divided by the total number of pounds processed to arrive at a

variable cost per pound. The figure charged by Primex per pound to the growers to process nuts less that variable cost per pound is the contribution margin.

At trial, Primex moved the court for prejudgment interest on the damages award. The court denied the motion. On appeal, Primex challenges the trial court's denial of prejudgment interest on the contribution margin damages.

Under Civil Code section 3287, subdivision (a), a party is entitled to recover prejudgment interest on the damages award from the date that the amount was both (1) due and owing and (2) certain or capable of being made certain by calculation. (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 919 (*Uzyel*).) The test for recovery of prejudgment interest under this section is whether the defendant (1) actually knows the amount of damages owed plaintiff, or (2) could compute that amount from information reasonably available to the defendant. (*KGM Harvesting, supra,* 36 Cal.App.4th at p. 391.) Prejudgment interest should be awarded only if one of these two conditions is met. (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 907.)

Damages that must be judicially determined based on conflicting evidence are not ascertainable. (*Uzyel, supra,* 188 Cal.App.4th at p. 919.) However, a legal dispute concerning defendant's liability or uncertainty regarding the measure of damages does not render damages unascertainable. (*Ibid.*)

On appeal, this court must independently review whether and when Primex's contribution margin damages were certain or capable of being made certain by calculation. (*KGM Harvesting, supra,* 36 Cal.App.4th at pp. 390-391.)

Primex argues that it is entitled to prejudgment interest on the contribution margin damages as of September 11, 2009, because on that date Chaparral received Primex's interrogatory answers and therefore had all the information it needed to calculate Primex's contribution margin loss. In these answers, Primex stated that it

> "currently estimates the damage resulting to it from Chaparral's breach of contract with respect to the 2007 crop to be $1,389,048.56. This amount includes two years of interest in the amount of $231,508.09. The amount is based on 3,452,351 in-shell pounds delivered by Chaparral to Cal Pure in 2007 and meats in the amount of 383,603 pounds. The contribution margin has been calculated at .2624 for the 2007 crop year. This calculation is only an estimate and is subject to change based on the calculation to be done by Plaintiff's expert (who will be disclosed and made available for deposition.)"

Similar information was given for the 2008 crop year with the contribution margin calculated at .2664.

However, in responding to a further set of interrogatories in November 2009, Primex noted it had changed its contribution margin calculations to reflect a "crop year" basis. Primex did not provide the supporting data showing how Primex arrived at those figures.

Thompson revised her calculations for the contribution margin a second and third time during her two depositions. Some of these changes were in response to criticism from Chaparral's expert. At trial, Thompson used $0.25 per pound to arrive at the contribution margin losses. Chaparral's expert did not dispute those figures.

Primex admits that the numbers set forth in the interrogatory answers vary from the numbers presented by its expert during her depositions and at trial but contends that these slight variations do not preclude a prejudgment interest award. Primex is correct that minor calculation errors that can easily be corrected do not make damages uncertain. (*KGM Harvesting, supra,* 36 Cal.App.4th at pp. 391-392.) It is when there is a large discrepancy between the amount demanded and the amount awarded that the damages will be considered uncertain. (*Uzyel, supra*, 188 Cal.App.4th at p. 920.) Also, damages are uncertain when they depend on a judicial determination based on conflicting evidence or when there is a lack of factual information needed to readily calculate damages. (*Ibid.*) If the defendant does not know or cannot readily compute the damages, the

plaintiff must supply the defendant with supporting data so that the defendant can ascertain the damages. (*KGM Harvesting, supra,* 36 Cal.App.4th at p. 391.)

Here, while Primex supplied Chaparral with its contribution margin, it did not provide the supporting data needed to make that calculation. This, combined with the expert's multiple calculation modifications, leads to the conclusion that the contribution margin damages were not ascertainable by Chaparral. Accordingly, the denial of prejudgment interest will be affirmed.

DISPOSITION

The judgment is affirmed. The parties will bear their own costs on appeal.

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LEVY, J.

WE CONCUR:

_____
WISEMAN, Acting P.J.

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KANE, J.